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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TOTAL TRANSPORTATON SERVICES, INC. a California corporation; OVERSEAS FREIGHT, INC. a California corporation; PACIFIC 9 TRANSPORTATION, INC. a California corporation; and SOUTHERN COUNTIES EXPRESS, INC., a California corporation,

Plaintiffs,

v.

JULIE SU, LABOR COMMISSIONER OF THE STATE OF CALIFORNIA, DEPARTMENT OF INDUSTRIAL RELATIONS, in her official capacity.

Defendant.

Case No. CV12-08949 MMM (AJWx)

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Original Complaint Filed: October 17, 2012
Trial Date: January 7, 2014
District Judge: Hon. Margaret M. Morrow
Magistrate Judge: Hon. Andrew J. Wistrich

NOW COME PLAINTIFFS FOR THEIR COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF HEREIN ALLEGE AS FOLLOWS:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court by virtue of 28 U.S.C. §§ 1331 and 1337, based on the federal question of whether the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §14501 ("FAAAA") preempts the application of California's wage and hour laws and other employee-related statutes to licensed logistical motor carrier companies that provide drayage services for the transportation of property in interstate commerce. Defendant Julie Su, Labor Commissioner of the State of California Department of Industrial Relations, ("Defendant") has applied, and continues to apply, the multi-factor test articulated in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d. 341 (1989) (the "*Borello* Test") resulting in the factual finding of the existence of an employer-employee relationship and the issuance of an Order, Decision or Award ("ODA") under California's applicable wage orders and relevant California Labor Code sections.

2. Plaintiffs seek a judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq*. that Plaintiffs are exempt from complying with the State's wage and hour laws and other employee-related statutes resulting from Defendant's application of the *Borello* test because such laws as applied to Plaintiffs' logistical motor carrier services adversely affect the prices, routes, and drayage services of Plaintiffs' transportation of property in interstate commerce.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because the drayage services provided by Plaintiffs and that are subject to FAAAA preemption were entered into and carried out within the geographical boundaries of the United States District Court for the Central District of California, and a substantial amount of the alleged events occurred in this judicial district.

4. **The Plaintiffs.** Plaintiff Total Transportation Services, Inc. is a California corporation having its principal place of business in the State of California ("TTSI"); Plaintiff Overseas Freight, Inc. is a California corporation having its principal place of business in the State of California ("Overseas Freight"); Plaintiff Pacific 9 Transportation, Inc. is a California corporation having its principal place of business in the State of California ("Pac 9"); and Plaintiff Southern Counties Express, Inc. is a California corporation having its principal place of business in the State of California ("Southern Counties") (collectively, the "Plaintiffs"). The Plaintiffs are licensed logistical motor carrier companies that manage, coordinate and schedule the movement of property from port locations through duly authorized and valid motor contract carrier permits issued by the Federal Motor Carrier Safety Administration, a division of the U.S. Department of Transportation (the "Motor Carrier Services"). The Motor Carrier Services are carried out by the Plaintiffs by leasing truck tractors, including clean trucks, and trailers to independent contractors who deliver goods to and from the Ports of Los Angeles and Long Beach, California, pursuant to operating authorities issued and regulated by the U.S. Department of Transportation (the "DOT"). Among other things, the DOT regulates the motor carriers' hours of service, the lease requirements when the truck used is not owner-operated by the motor carrier, and insurance requirements in order to perform the Motor Carrier Services. The customers serviced by the Plaintiffs and independent contractors include, but not limited to, The Home Depot, Target, Honeywell, and Konica Minolta Business Solutions, to name a few.

5. **The Labor Commissioner.** Defendant Julie Su is the Labor Commissioner of the California Department of Industrial Relations, which is a member department of the California Labor and Workforce Development Agency. The Office of the Labor Commissioner (also known as the State "Division of Labor Standards Enforcement," or "DLSE") was established, among other things, to adjudicate wage claims under the California Labor Code.

FACTS

6. The Plaintiffs have contractual relationships with independent contractors that are memorialized in individual and secular forms of Vehicle Lease Agreements, Freight Hauling Agreements, and other similar agreements, confirming the independent contractors' status as "independent contractors" who are responsible for their own taxes, insurance, licenses, employees, and other requirements necessary to transport freight by truck in California under lease with any one of the Plaintiffs. Pursuant to these Agreements, the independent contractors are also responsible for their own business expenses, including maintenance, repair, parking and fuel expenses, and are compensated for freight hauling in accordance with negotiated rates and not by the payment of wages. These independent contractors regularly enter into independent contractor agreements providing for the performance of transportation services for the Plaintiffs on a non-exclusive basis, and are not treated by the Plaintiffs as employees for any purpose, including payroll tax withholding, and accordingly, are not subject to California's labor and employment laws.

The Ports' Operations and the Plaintiffs' Motor Carrier Services

7. The Los Angeles and Long Beach Ports are open from 8:00 a.m. to 4:00 p.m. and again from 6:00 p.m. to 3:00 a.m. Plaintiffs and other licensed logistical motor carrier companies are notified by their respective customers approximately 2 to 4 weeks in advance of when a cargo ship has departed a particular country heading to either the Los Angeles or Long Beach Port containing goods and property for pickup and delivery to that customer. The notification also includes the number of containers the customer is expecting to arrive on that particular cargo ship, which impacts the size and number of deliveries to that customer. Along with that notification are delivery schedule dates on which the customer is expecting its product to be delivered to its distribution center. The expected arrival schedule of those containers is further revised weekly and sometimes daily, based upon a variety of conditions, including, but not limited to, weather and labor conditions at the

terminals. Once the containers arrive by cargo ship, they are placed by the Port's longshoremen in various places in the terminal yard and efforts are then made to ready the containers for pickup, which include, but not limited to, clearing customs and identification of the containers. Consequently, the Plaintiffs' ability to timely meet their respective customer's delivery schedules is dependent upon (1) the weather conditions in route to the destination port; (2) availability of gates/terminals at the destination port (while ports publish a monthly schedule of times the gates are opened, the actual times vary from day to day and week to week depending upon union related Stop Work Meetings, strikes/work stoppage, and vacation schedules of the longshoremen who remove the cargo from the cargo ships); (3) the time it takes for the independent contractor to get in and out of the ports (the average duration to get in and out of the Port is between 2 and 3 hours per trip); and (4) Holidays observed by the Ports, of which there are fifteen. The Port's schedules are also affected by the U.S. sequester budget cuts, resulting in gates closing earlier than scheduled. Finally, for safety reasons, the DOT's hours of service requirements limit drivers to a set number of hours in a truck per day, and limits the number of continuous driving days per week. The DOT is implementing rules to start tracking such times by requiring motor carriers to install and use in each truck an electronic logging device called an Electronic Onboard Recorder. This rule is scheduled to go into effect in the Fall/Winter of 2013.

8. To provide the level of service required by its customers, driven largely by the timely meeting of delivery schedules within the confines of the DOT regulations, licensed logistical motor carrier companies such as the Plaintiffs must have maximum flexibility in managing, coordinating and scheduling the pickup and delivery of goods and products in the stream of intrastate and interstate commerce. This flexibility is achieved through the use of independent contractors.

9. The independent contractors determine the days and hours they will work and which pickups they will accept, the routes used to pick up and deliver the

goods and products from the Ports, and other hauling decisions in getting the trucks in and out of the Ports safely, quickly and efficiently. The independent contractors are paid per leg (or piece meal) of a round-trip. A round-trip includes getting into the Port, picking up the containers of goods and products for a particular customer, exiting the Port, getting the goods and products to that customer, and returning the containers used to ship and carry the good and services back to the Port for drop-off. The more legs completed by the independent contractor, the more the independent contractor will earn under its agreement with the motor carriers. Consequently, it is the independent contractor who determines how much the contractor wants to make for a day of drayage work within the limits imposed by the DOT.

The Clean Truck Program

10. Beginning in 2008, the Board of Harbor Commissioners of the City of Los Angeles and the Port of Long Beach adopted a "Clean Trucks Program" which was designed to replace pollution-causing trucks with newer ones that would emit fewer particulates. The Clean Truck Program was made part of a Concession Agreement whereby "clean trucks" were required to be used by motor carriers hauling freight to and from the Ports by 2012 and was aimed at reducing air pollution. In devising the Clean Truck Program, the Ports recognized that the vast majority of port drayage was hauled by independent contractors under lease agreements with licensed logistical motor carriers such as the Plaintiffs, and implemented an incentive program providing operators with the opportunity to obtain access to and possible ownership of newer, lower-emission "clean trucks" through a Truck Funding Program. Also in 2008, the Ports began informing and educating licensed motor carriers and independent contractors regarding the requirements for the Clean Truck Programs including the availability of grants and other subsidies for truck owners to upgrade or replace their existing vehicles to meet the Clean Truck Program mandates. The grant and subsidy programs offered as much as 80% for qualifying vehicle owners who participated in the leasing and grant

program. Under the Port's own lease-to-own programs, an applicant was entitled to exchange an old truck for a pre-approved new truck under a seven-year lease agreement that was subsidized up to 80% by the Port. At the conclusion of the lease terms, an applicant was also entitled to a subsidy towards the purchase of the truck for the lease. Plaintiffs are informed and believe, and on the basis of such information and belief allege, that despite these incentives offered by the Ports, most independent contractors were unable or unwilling to use the Ports' leasing programs. Plaintiffs allege on information and belief that access and use of the Ports' leasing programs by independent contractors was affected by, among other things, the filing of a lawsuit in the Central District of California for the United Stated District Court by the American Trucking Association ("ATA") against the Port of Long Angeles in July 2008, entitled *American Trucking Association v. Port of Los Angeles*, Case No. CV 08-4920 CAS (RZx). In that lawsuit, the ATA alleged that certain provisions of the Los Angeles Concession Agreement were preempted by federal law. Specific to this matter, ATA challenged the provision of the Concession Agreement which required licensed motor carriers to transition from using independent contractors as drivers to employee drivers. As a result of this litigation, the Port of Los Angeles refrained during the three-year pendency of this litigation from implementing this so-called "employee-driver" provision. Whether the employee-driver requirement would ever be implemented was finally resolved in the Fall of 2011, when the Ninth Circuit Court of Appeals issued its decision finding that the employee-driver provision was preempted by the FAAAA. (*See, American Trucking Associations, Inc. v. City of Los Angeles*, 660 F.3d 384, 408 (9th Cir. 2011).) The Port of Los Angeles issued a Notice stating that it would not enforce the employee-driver provision.

11. Because many independent contractors could no longer provide services to the Plaintiffs due to their inability or unwillingness to purchase trucks that qualified under the Clean Truck Program, or otherwise use the Ports' leasing

program, Plaintiffs arranged for the purchase and availability for lease and/or purchase of a number of trucks that complied with the new requirements and subsequently made them available to independent contractors for lease and/or purchase pursuant to lawful commercial terms and conditions.

DLSE Investigation, Hearings and Findings

12. In or around 2010, Defendant commenced investigations of licensed logistical motor carrier companies to determine whether or not the independent contractors with whom each company contracts should be reclassified and treated as employees under California law. Those investigations against some of the Plaintiffs were ultimately abandoned, and the Defendant began to process and adjudicate individual claims brought against these companies by independent contractors claiming for the first time that they were misclassified.

13. In or around the last quarter of 2011 and the first quarter of 2012, two independent contractors with existing independent contractor agreements with Plaintiff TTSI filed claims with Defendant seeking an adjudication and determination of the existence of an employer-employee relationship and seeking amounts for alleged unlawful deductions, interests and waiting time penalties under various provisions of the California Labor Code. Defendant held hearings on the aforementioned claims and found the existence of an employer-employee relationship with each claimant, stating "*the overriding factor in determining whether the [claimant] was an employee rather than an independent contractor relied on the factor that the [claimant] who performed the work was not engaged in an occupation of business distinct from that of the Defendant [TTSI herein]. Rather, his work was the basis for the Defendant's work.*" (Emphasis added.) Defendant ordered Plaintiff TTSI to pay each claimant within ten (10) days an award that collectively totaled approximately $179,322.70. Attached hereto as Exhibit "A" and incorporated herein by reference are true and correct copies of the ODAs of the Defendant Labor Commissioner. Within 10 days of the Defendant's ODAs and

pursuant to California Labor Code Section 98.2, Plaintiff TTSI posted bonds and appealed to the Superior Court for the County of Los Angeles.

14. On or around the last quarter of 2011 and during the first quarter of 2012, independent contractors under independent contractor agreements with Plaintiffs Overseas Freight, Pac 9, and Southern Counties filed claims with Defendant seeking an adjudication and determination of the existence of an employer-employee relationship and seeking amounts for alleged unlawful deductions, interests and waiting time penalties under various provisions of the California Labor Code. Upon those claims being set for hearing by Defendant, Plaintiffs Overseas Freight, Pac 9, and Southern Counties filed petitions to compel arbitration under the terms of the independent contractor agreements. Attached hereto and incorporated herein as Exhibit "B" are true and correct copies of the petitions to compel.

15. Plaintiffs are informed and believe, and on the basis of such information and belief allege that Defendant has filed papers with the Superior Court stating that the claims filed against Plaintiffs Overseas Freight, Pac 9, and/or Southern Counties are not appropriate for arbitration and must proceed to a hearing before one of its hearing officers.

16. The Defendant's ODAs against Plaintiff TTSI finding the existence of employee-employer relationships, and the scheduled hearings for claims filed against Plaintiffs Overseas Freight, Pac 9 and Southern Counties, which on information and belief will result in similar findings should those hearings go forward, have the effect of completely destroying the Plaintiffs' flexibility in managing, coordinating and scheduling the pickup and delivery of goods and products in the stream of intrastate and interstate commerce.

The Borello Test and its Impact on Plaintiffs' Motor Carrier Services

17. Defendant has applied and continues to apply the *Borello* Test. Defendant's application of the *Borello* Test essentially ensures a finding by

Defendant of an employer-employee relationship when applied to Plaintiffs' Motor Carrier Services and the necessity of allowing the independent contractors to lease trucks in order to comply with the Concession Agreement under the Clean Truck Program[1] if those independent contractors want to continue doing Port drayage work.

18. Defendant's application of the *Borello* Test is inconsistent with the application of the Economic Realities Test under the Fair Labor & Standards Act ("FLSA"). The FLSA's Economic Realities Test does not give particular weight to any one factor but considers all of the factors equally within the context of the total activity or situation. *See Fichman v. Media Center*, 512 F.3d 1157 (9th Cir. 2008).

19. Plaintiffs are informed and believe and on the basis of such information and belief allege that the application by Defendant of the *Borello* Test has resulted in and will continue to result in the finding of employee-employer relationships in the context of Plaintiffs' Motor Carrier Services that consequently directly affect prices, routes and services in the transportation of property in interstate commerce as more fully alleged below. Plaintiffs are also subject to the Economic Realities Test under the provisions of the FLSA for purposes of determining employment status. Requiring the Plaintiffs to operate under two different standards in California is antithetical to federal regulations that attempt to prevent states from increasing burdens on and interfering with interstate motor vehicle transportation.

20. Plaintiffs are informed and believe, and on the basis of such information and belief allege that requiring Plaintiffs to convert to an employee model to conduct

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[1] In *American Trucking Associations, Inc. v. City of Los Angeles*, 2010 WL 3386436 (C.D.Cal.), District Court Judge Christina A. Snyder found that the FAAAA preempted the employee-driver provision contained in the Concession Agreement *(i.e., prohibiting trucks driven by independent owner-operators from providing drayage services)* because it affected the motor carriers' prices, routes, and services unless saved by any applicable exception. She concluded that the employee-driver provision was saved by the market-participant exception. The Ninth Circuit reversed, holding that "the employee-driver provision is "tantamount to regulation and thus does not fall under the market-participant exception." *American Trucking Associations, Inc. v. City of Los Angeles*, 660 F.3d 384, 408 (9th Cir. 2011). Thereafter, the Port of Los Angeles did not challenge the Court's ruling on the employee-driver provision.

the Motor Carrier Services would directly and immediately adversely affect prices, routes and services currently being provided to its customers who operate in intrastate and interstate commerce. The employee model would increase the rates charged to customers in excess of fifty percent because of: (1) the hourly rate per employee, plus costs for benefits (medical, dental and pension plans) and other employee related statutes (e.g., family and medical leave), workers' compensation insurance, and allowance for overtime; (2) the need to increase the number of employees to off-set the decrease in productivity and efficiency of the workers which will drop by 50%; and (3) the need to purchase additional trucks for the new additional employees hired to offset the drop in productivity. However, Plaintiffs' current margins are insufficient to cover the additional costs if absorbed by the Plaintiffs.

21. The employee model would result in reduced services, affect routes and jeopardize the timely delivery of goods and products to the customers. Being required to provide up to (2) two 30-minute uninterrupted meal breaks and three (10) ten minute rest breaks would necessarily require drivers who might otherwise be in line to enter the Port to pull over, if not exit the Port altogether due to the Ports' parking restrictions, and alter routes to find a safe place to park in order to take such mandated meal and rest breaks. California laws restrict drivers from parking wherever they want; for example, Vehicle Code Section 22500(h) prohibits double parking, and Vehicle Code Section 22500(e) prohibits the blocking of driveways. Additionally, some local ordinances restrict access to certain roads, areas and communities by trucks over a certain weight and length. Consequently, what would have been 2-3 hours on average to enter and exit the Ports now becomes potentially up to 4-6 hours, as the driver has to start all over again at the back of the line to enter the Port having had to deviate from the intended route and reenter or exit the Port to comply with the mandated meal and rest breaks and the various local ordinances regulating where and when such trucks can pull over and park. If the employee-

driver misses the window when the gates are opened because he or she is on a mandated meal or rest break and either (1) there is an unforeseen work stoppage, (2) reentering the line to gain access causes additional delays, or (3) there is an early closing of a particular gate, the timely delivery of the goods and products for that particular customer for that particular day is thwarted. The additional costs in fuel consumption, additional miles driven and vehicle wear and tear are either absorbed by the licensed logistical motor carriers or passed to their respective customers in the form of higher rates for services.

22. Plaintiffs, and each one of them, conduct Motor Carrier Services outside of California using the independent contractor model. Defendant's attempt to force the Plaintiffs to an employee model in California, while they continue to use independent contractors outside of California will adversely affect the Plaintiffs' overall business model resulting in the added costs being distributed to their respective operations outside of California thereby impacting the prices, routes and services performed in those states for those customers.

23. Plaintiffs are informed and believe, and on the basis of such information and belief allege that approximately 40% of the Nation's cargo comes into California Ports.

24. Plaintiffs are informed and believe, and on the basis of such information and belief allege that should they, and each of them, attempt to pass along the added costs of the employee model to their respective customers, reduce the current level of service by reducing the number of round-trips, and/or fail to timely pickup and delivery goods and products when scheduled, the customers would find other means of service such as direct rail through Canada thereby impacting jobs in California and beyond, or pass the added costs on to the consumer who ultimately buys its goods and products.

The FAAAA

25. The FAAAA preempts laws that affect prices, routes, or services in the

transportation of property. Section 14501(c) "Motor Carriers of Property" provides:

"(1) General rule.--Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered.--Paragraph (1)--

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . ."

49 U.S.C § 14501.

26. Plaintiffs are informed and believe, and on the basis of such information and belief allege that Congress enacted the FAAAA (1) to extend to "motor private carriers" the "identical intrastate preemption of prices, routes and services as that originally contained in the Airline Deregulation Act [of 1978, 49 U.S.C. Section 41713(b) (the "ADA")]"; and (2) to prevent the states from increasing burdens on and interfering with interstate motor vehicle transportation. Regulations that have a significant effect on a motor carrier's prices, routes, or services are preempted.

27. Plaintiffs are informed and believe, and on the basis of such information and belief allege that the Defendant's application of the *Borello* Test to claims filed against Plaintiffs has resulted in and will continue to result in Defendant finding the existence of employee-employer relationships subjecting Plaintiffs to the full measure of California's wage and hour and employee-related laws applicable to employees performing work within the State. These laws as applied to the Plaintiffs' Motor Carrier Services adversely affect prices, routes and services in the transportation of property in interstate commerce.

28. Plaintiffs are informed and believe, and on the basis of such information and belief allege that Defendant disputes that the application of the full measure of California's wage and hour and employee related laws adversely affect prices, routes

and services in the transportation of property in interstate commerce.

FIRST CLAIM FOR DECLARATORY RELIEF

29. Plaintiffs incorporate herein by reference each and every allegation contained in the foregoing paragraphs, inclusive, as if fully set forth below.

30. A case or controversy has arisen by virtue of Plaintiff TTSI suffering an injury-in-fact directly related to Defendant's application of the *Borello* Test, resulting in ODAs and the finding of the existence of an employee-employer relationship with respect to each of the claims filed against Plaintiff TTSI. Plaintiff TTSI's injuries are actual, particularized and concrete, in that but-for Plaintiff posting a bond and appealing the Orders to the Los Angeles Superior Court, Defendant's ODAs would have become final and enforceable judgments in a court of law. In short, had the ODAs become final enforceable judgments, Plaintiff TTSI would have been forced to either close down shop or convert each of its independent contractors to employees (assuming they would be willing to give up their business and become employees), either of which has the practical effect of adversely affecting Plaintiff's prices, routes and services in the transportation of property in intrastate and interstate commerce. Plaintiff TTSI has exhausted all administrative avenues and processes available to it to redress the injuries alleged herein. Plaintiff TTSI believes and thereon alleges that a declaration from this Court is required that FAAAA preempts, and by virtue of preemption, exempts Plaintiff TTSI from complying with California's wage and hour and employee-related laws with respect to their Motor Carrier Services as those laws apply to employees performing services within the State of California. A declaration by this Court for the relief requested would redress the injuries alleged herein. Failing to provide the specific relief requested would result in continued harm and injury to Plaintiff TTIS by imposing upon it a business model that will effectively put it out of business within the State of California.

31. A case or controversy has arisen by virtue of an imminent injury facing

Plaintiffs Overseas Freight, Pac 9 and Southern Counties by virtue of Defendant setting for hearings the claims filed against Plaintiffs Overseas Freight, Pac 9 and Southern Counties, seeking an adjudication and findings of the existence of employee-employer relationships. Based on the findings from the hearings conducted by Defendant with respect to the claims filed against Plaintiff TTSI where the facts adjudicated by Defendant were identical in every respect to the claims currently set for hearings, Plaintiffs Overseas Freight, Pac 9 and Southern Counties are informed and believe and on the basis of such information and belief allege that the outcome of those hearings will be no different than the hearings held and adjudicated against Plaintiff TTSI, resulting in findings of employee-employer relationships and fines, penalties and back wages in excess of $179,000. The imminent injury that Plaintiffs Overseas Freight, Pac 9 and Southern Counties will suffer is directly related to Defendant's application of the *Borello* Test. Plaintiffs Overseas Freight, Pac 9 and Southern Counties' imminent and anticipated injuries are actual, particularized and concrete, in that but-for the filing of petitions to compel arbitration, the hearings dates set by Defendant would have proceeded. Plaintiffs Overseas Freight, Pac 9 and Southern Counties are informed and believe and on the basis of such information and belief allege that Defendant has argued, and continues to argue, that arbitration is inappropriate for the claims asserted and the hearings as scheduled should proceed. Should the hearings be conducted and findings of employee-employer relationships be found as expected and anticipated based on prior findings on identical facts, and should those ODAs become final and enforceable judgments in a court of law, Plaintiffs Overseas Freight, Pac 9, and Southern Counties will be forced to either close down shop or convert each of its independent contractors to employees, either of which has the practical effect of adversely affecting their prices, routes and services in the transportation of property in intrastate and interstate commerce. Plaintiffs Overseas Freight, Pac 9, and Southern Counties believe and therefore alleged that a declaration from this Court is

required that FAAAA preempts, and by virtue of preemption, exempts them from complying with California's wage and hour and employee-related laws with respect to their Motor Carrier Services as those laws apply to employees performing services within the state of California. A declaration by this Court for the relief requested would redress the injuries alleged herein. Failing to provide the specific relief requested would result in continued harm and injury to Plaintiffs Overseas Freight, Pac 9 and Southern Counties by imposing upon them a business model that will effectively put them out of business within the State of California.

32. A declaration of the parties' rights and interests is necessary and required in order to resolve this dispute and to determine whether the FAAAA preempts California's wage and hour and employee-related laws as such laws are applied to Plaintiffs' Motor Carrier Services. A declaratory judgment is both necessary and proper under the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq., to determine the rights, obligations and liabilities that exist among and between the parties.

SECOND CLAIM FOR INJUNCTIVE RELIEF

33. Plaintiffs incorporate herein by reference each and every allegation contained in the foregoing paragraphs, inclusive, as if fully set forth herein.

34. The Defendant's continued application of the *Borello* Test resulting in findings of employee-employer relationships and the on-going attempt to enforce existing ODAs will continue to cause Plaintiffs irreparable harm so as to warrant a temporary restraining order, preliminary injunction, and permanent injunction. Ordinary remedies available at law, such as monetary damages, are inadequate to compensate for the injuries alleged. Plaintiffs request that the Court issue an order (1) prohibiting the Defendant from applying the *Borello* Test, which fails to give appropriate and proper weight to all of the factors set out in *Borello* in determining the existence of an employee-employer relationship, and (2) prohibiting the enforcement by Defendant of the existing ODAs currently on appeal in Los Angeles

Superior Court. Such an Order will maintain the status quo and permit this case to move forward to a final declaratory judgment with respect to the issue of whether California's wage and hour and employee-related laws as applied to Plaintiffs' Motor Carrier Services are preempted by FAAAA in that such laws adversely affect prices, routes and services in the transportation of property in interstate commerce.

35. There is a strong likelihood that Plaintiffs will prevail on the merits, in that California's wage and hour and employee-related laws when applied to Plaintiffs' Motor Carrier Services adversely affects the Plaintiffs' prices, routes and services in the transportation of property in interstate commerce and therefore should be preempted by FAAAA.

36. Plaintiffs will suffer irreparable injury if injunctive relief is not granted because they will either have to (1) continue to post bonds and appeal ODAs in state court and/or file petitions to compel arbitration of individual claims, all at great financial expense to Plaintiffs and each of them, with the possibility that the state court could uphold the Defendant's ODAs and the Defendant subsequently seek to enforce those judgments; or (2) cease all Motor Carrier Services using independent contractors until such time as a determination of the parties' rights, interests and obligations are made by this Court, thereby jeopardizing the relationships Plaintiffs have with their respective customers and effectively closing down shop and terminating the routes and services in the transportation of property—the very issue they seek to avoid by seeking the relief requested herein.

37. Should Defendant be enjoined until such time as this Court can declare the parties' rights, interests and obligations, it merely will have to wait until the outcome of this action to resume its practices. The balance of hardships tip sharply in the favor of the Plaintiffs who in the absence of injunctive relief, will spend inordinate sums of money defending themselves on parallel tracks or be forced to cease all operations and terminate their respective routes and services in the transportation of property in interstate commerce.

38. The public's interests will be advanced by precluding the application of the *Borello* Test resulting in the finding of employee-employer relationships which are or should be preempted by FAAAA. The public's interests will further be advanced by precluding the enforcement of ODAs; failing to do so will likely result in the Plaintiffs going out of business within the State of California, thereby terminating routes and services in the transportation of property in interstate commerce.

WHEREFORE, Plaintiffs demand judgment against Defendant as follows:

On Plaintiffs' First Claim for Declaratory Relief

1. The Court determine and declare that the State's full measure of wage and hour and employee-related laws as applied to Plaintiffs' Motor Carrier Services are preempted by FAAAA because such laws when applied to Plaintiffs' Motor Carrier Services adversely affect prices, routes and services in the transportation of property in interstate commerce;

2. For their respective attorneys' fees and costs of suit herein; and

3. For such other and further relief as the Court deems just and proper.

On its Second Claim and Injunctive Relief

1. Issue a Temporary Restraining Order prohibiting the Defendant from (1) applying the *Borello* Test, and (2) enforcing the existing ODAs currently on appeal in Los Angeles Superior Court;

2. Grant a Preliminary Injunction, and thereafter a Permanent Injunction, pursuant to Federal Rule of Civil Procedure 65, prohibiting Defendant from (1) applying the *Borello* Test, and (2) enforcing the existing ODAs currently on appeal in Los Angeles Superior Court;

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3. For Plaintiffs' attorneys' fees and costs of suit herein; and

4. For such other and further relief as the Court deems just and proper.

DATED: August 15, 2013

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: _____
Robert R. Roginson
Johnnie A. James
Benjamin Ikuta

Attorneys for Plaintiffs Total Transportation Services, Inc., Overseas Freight Inc., Pac 9 Transportation, Inc., and Southern Counties Express, Inc.

LABOR COMMISSIONER, STATE OF CALIFORNIA Department of Industrial Relations Division of Labor Standards Enforcement 300 Oceangate, Suite 302 Long Beach, CA 90802 Tel: (562) 590-5048 Fax: (562) 499-6467	For Court Use Only:
Plaintiff: Cristobal Cardona Barrera	Court Number
Defendant: TOTAL TRANSPORTATION SERVICES, INC.	
State Case Number 05 - 55410 LT	ORDER, DECISION OR AWARD OF THE LABOR COMMISSIONER

1. The above-entitled matter came on for hearing before the Labor Commissioner of the State of California as follows:
DATE: December 3, 2012 ☒ CONTINUED TO:
CITY: 300 Oceangate, Suite 302, Long Beach, CA 90802

2. IT IS ORDERED THAT: **Plaintiff recover from Defendant.**

$	54,940.00	for wages (with lawful deductions)
$		for liquidated damages pursuant to Labor Code Section 1194.2
$		Reimbursable business expenses
$	7,977.60	for interest pursuant to Labor Code Section(s) 98.1(c), 1194.2 and/or 2802(b),
$	9,000.00	for additional wages accrued pursuant to Labor Code Section 203 as a penalty *and that same shall not be subject to payroll or other deductions.*
$		for penalties pursuant to Labor Code Section 203.1 which *shall not be subject to payroll or other deductions.*
$	/	other (specify):
$	71,917.60	TOTAL AMOUNT OF AWARD

3. The herein Order, Decision or Award is based upon the Findings of Fact, Legal Analysis and Conclusions attached hereto and incorporated herein by reference.

4. The parties herein are notified and advised that this Order, Decision or Award of the Labor Commissioner shall become final and enforceable as a judgment in a court of law unless either or both parties exercise their right to appeal to the appropriate court* within ten (10) days of service of this document. Service of this document can be accomplished either by first class mail or by personal delivery and is effective upon mailing or at the time of personal delivery. If service on the parties is made by mail, the ten (10) day appeal period shall be extended by five (5) days. For parties served outside of California, the period of extension is longer (See Code of Civil Procedure Section 1013). In case of appeal, the necessary filing fee must be paid by the appellant and appellant must, immediately upon filing an appeal with the appropriate court, serve a copy of the appeal request upon the Labor Commissioner. If an appeal is filed by a corporation, a non-lawyer agent of the corporation may file the Notice of Appeal with the appropriate court, but the corporation must be represented in any subsequent trial by an attorney, licensed to practice in the State of California. Labor Code Section 98.2(c) provides that if the party seeking review by filing an appeal to the court is unsuccessful in such appeal, the court shall determine the costs and reasonable attorney's fees incurred by the other party to the appeal and assess such amount as a cost upon the party filing the appeal. An employee is successful if the court awards an amount greater than zero.

PLEASE TAKE NOTICE: Labor Code Section 98.2(b) requires that as a condition to filing an appeal of an Order, Decision or Award of the Labor Commissioner, the employer shall first post a bond or undertaking with the court in the amount of the ODA; and the employer shall provide written notice to the other parties and the Labor Commissioner of the posting of the undertaking. Labor Code Section 98.2(b) also requires the undertaking contain other specific conditions for distribution under the bond. While this claim is before the Labor Commissioner, you are required to notify the Labor Commissioner *in writing* of any changes in your business or personal address within 10 days after any change occurs.

LABOR COMMISSIONER, STATE OF CALIFORNIA

*L.A. Superior Court
Long Beach (South District)
415 West Ocean Blvd.
Long Beach, CA 90802

BY: _____
Alonso Silva HEARING OFFICER

DATED: February 28, 2013

LABOR COMMISSIONER, STATE OF CALIFORNIA Department of Industrial Relations Division of Labor Standards Enforcement 300 Oceangate, Suite 302 Long Beach, CA 90802 Tel: (562) 590-5048 Fax: (562) 499-6467	For Court Use Only:
DEMANDANTE: Cristobal Cardona Barrera	Court Number
DEMANDADO: TOTAL TRANSPORTATION SERVICES, INC.	
Número del Caso Estatal 05-55410 LT	ORDEN, DECISION O FALLO DEL COMISIONADO LABORAL

1. El asunto antedicho fue atendido en una audiencia ante el Comisionado Laboral del Estado de California en el siguiente lugar y fecha:
Fecha: December 3, 2012 ☒ APLAZADO PARA EL:
Ciudad: 300 Oceangate, Suite 302, Long Beach, CA

2. SE ORDENA QUE: Demandante recibe de el Demandado.

$ 54,940.00 por sueldos (con deducciones legales)
$ _____ por danos liquidados conforme con la Sección del Codigo Laboral 1194.2
$ _____ gastos del negocio reembolsables
$ 7,977.60 por en interés conforme al Código Laboral, Sección(s) 98.1(c), 1194.2 y/o 2802(b)
$ 9,000.00 por sueldos adicionales acumulados conforme al Código Laboral, Sección 203, como multas que no quedan sujetas a deducciones de nómina o de otro tipo
$ _____ por sueldos adicionales acumulados conforme del Código de Labor Sección 203.1.
$ _____ otra (especifique):
$ 71,917.60 CANTIDAD TOTAL DEL FALLO

3. La presente Orden, Decisión o Fallo se basa en las Conclusiones de los Hechos y Análisis Legal adjuntos a la presente e incorporados por referencia.

4. Por medio de la presente se les avisa y se les hace saber a las partes que esta Orden, Decisión o Fallo del Comisionado Laboral será final y ejecutable como un fallo del tribunal al menos que una o ambas partes ejerciten su derecho de apelar ante el tribunal correspondiente * dentro de diez (10) dias de habérseles entregado este documento. La entrega de este documento puede efectuarse ya sea por medio de correo de primera clase o por entrega personal y su fecha efectiva es la del día de envío o la de entrega en persona. Si la entrega a las partes se hace por correo, el periodo de diez (10) días para la apelación se extenderá por cinco (5) días. Para las partes a quienes se les hizo la entrega del aviso fuera de California, el periodo de extensión será más largo (Ver el Código de Procedimientos Civiles, Sección 1013) En caso de una apelación, los gastos de registro serán pagados por el apelante, quien deberá enviarle al Comisionado Laboral una copia de la petición de apelación inmediatamente después de haberla presentado ante los tribunales correspondientes. Si es una empresa la que presenta el Aviso de Apelación, puede hacerlo por medio de un agente que no sea abogado ante los tribunales correspondientes, pero dicha empresa debe ser representada en cualquier juicio subsecuente por un abogado con licencia para practicar leyes en el Estado de California. El Código Laboral, Sección 98.2(c) provee que si las partes que buscan una revisión presentando una apelación ante el tribunal no tienen éxito en dicha apelación, el tribunal deberá determinar los costos y honorarios razonables que contrajo la parte contraria de la apelación e imputará dicha cantidad como costo a la parte que presentó la apelación. Un empleado es exitoso, la tribunal hace el premio si cantidad es más grande que zero. FAVOR DE TOMAR EN CUENTA que el Código Laboral, Sección 98.2(b) requiere que, como condición para presentar una apelación a una Orden, Decisión o Fallo del Comisionado Laboral, el empleador deberá establecer primero una fianza o garantía con el tribunal por la cantidad indicada en la Orden, Decisión o Fallo; y el empleador deberá proveer un aviso por escrito a las demás partes y al Comisionado Laboral de haber hecho tal garantía. El Código Laboral, Sección 98.2(b) también requiere que la garantía contenga ciertas condiciones específicas más para ser distribuidas bajo la fianza. Mientras este reclamo esta antes la Comision Laboral, es requerido bajo la Seccion de Codigo Laboral 98(a) notificar a la Comision Laboral por escrito cualquier cambio en su negocio o direccion personal dentro de 10 días despues de que cualquier cambio ocurra.

L. A. Superior Court
415 West Ocean Blvd.
Long Beach, CA 90802

COMISIONADO LABORAL, ESTADO DE CALIFORNIA

Por: _____
Alonso Silva Funcionario de Audiencias

FECHADO: February 28, 2013

BEFORE THE LABOR COMMISSIONER

OF THE STATE OF CALIFORNIA

CRISTOBAL BARRERA Plaintiff vs. TOTAL TRANSPORTATION SERVICES, INC. Defendant,	Case No. 05-55410-LT ORDER, DECISION, OR AWARD OF THE LABOR COMMISSIONER

BACKGROUND

The Plaintiff filed an initial claim with the Labor Commissioner's office on March 26, 2012. The complaint raises the following allegations:

1. Unlawful deductions made for the period of April 25, 2009 to August 27, 2011, in the amount of $54,940.00 per exhibit, and

2. Interest pursuant to California Labor Code § 98.1, and

3. Additional wages accrued pursuant to California Labor Code § 203 as a penalty at the rate of $300.00 per day for an indeterminate number of days not to exceed thirty (30) days, and

A hearing was conducted in Long Beach, California on September 27, 2012 and was completed on December 3, 2012, before the undersigned-hearing officer designated by the Labor Commissioner to hear this matter. The Plaintiff appeared in person and was not represented by Counsel. Safety and Compliance Manager Richard Martinez appeared on behalf of the Defendant and was represented Attorney Robert Roginson. Co-Plaintiff Jose Montero appeared as witnesses on behalf of the Plaintiff. Interpreters Randy Castillo (9/27/12) and Albert Sousa (12/3/12) appeared on behalf of the Division.

Due consideration having been given to the testimony, documentary evidence, and arguments presented, the Labor Commissioner hereby adopts the following Order, Decision or Award.

FINDINGS OF FACT

Plaintiff testified that the Defendant employed him as a Truck Driver for the period of April 25, 2009 to August 27, 2011. Plaintiff was employed in the County of Los Angeles, California under the terms of a written agreement. Plaintiff testified he was paid wages based on the load he delivered. He resigned on September 14, 2011.

Plaintiff is claiming unlawful deductions made for the period of April 25, 2009 to August 27, 2011, in the amount of $54,940.00 per Exhibit 1. He stated that he completed Exhibit 1 based on his paystubs. Plaintiff testified that he was an owner/operator when the "Clean Truck" program was initiated. He maintained that he signed an independent contractor agreement with Defendant (Exhibit 2) in order to drive a compliant truck to keep working. Plaintiff said that he could not take the truck off Defendant's property and could not park elsewhere. He conceded that he was told that the deductions would be made over a five (5) year lease to own arrangement but argued that he was an employee because he name was never on the truck registration or insurance over the two (2) plus years that he paid. He alleged that he never asked to use the truck to work for another employer because the truck was not in his name and he could not obtain insurance without it.

Martinez stated that Defendant has lease agreements with approximately 150 drivers using their own vehicle. He said that the drivers chose to lease a "Clean Truck" from Defendants because they could not afford their own. He testified that they signed a five (5) year lease but none of the leases had matured. He asserted that the drivers knew they were independent contractors paid with a 1099 and could drive for other companies but never asked, turn down loads, choose their own routes, wear their own clothing, make their own schedule within Department of Transportation and Port rules,

park the vehicle at the place of their choosing as they kept the keys, chose their own mechanic and purchase their own insurance.

Plaintiff requests additional wages accrued pursuant to California Labor Code § 203. Since his separation with the Defendant he is owed wages.

LEGAL ANALYSIS

A party raising a defense to a claim bears the burden of proof as to each fact that is essential to the defense that he or she is asserting. The Defendant raised the defense that the Plaintiff was an independent contractor/operator from the period of February 1, 2009 to June 29, 2011 and should not be considered an employee for wage and hour purposes.

There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations 1989*).

In this matter the Defendant contends the Plaintiff is an independent contractor not subject to the jurisdiction of the Labor Commissioner's Office for wage and hour purposes. In determining whether an individual providing service to another is an employee or an independent contractor there is no single determinative factor. Under the common law, the principle test was whether the person for whom the service was rendered had the right to control the manner and means of accomplishing the result desired.

In *Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341, the California Supreme Court rejected the traditional common law focus on control of work details as the only determinative factor in analyzing an employee-employer relationship for the purposes of labor law protective legislation. Instead, the *Borello* court decision adopted a multi-factor test.

The Supreme Court noted that the various individual elements that must be considered are intertwined and their weight depends on particular combinations. The amount of control over work details is only one factor to be considered. In determining whether one acting for another is an employee or independent contractor the following multi-factor elements are applied as follows in this case:

A. Whether the person performing the service is engaged in a business or occupation distinct from that of the principal. *The work that the Plaintiff performed is an integral part, if not the essential core of the principal's business. Without the workforce of drivers the Defendant would not have a business. In this case, the Defendant's business is transporting services or goods. Defendant would be unable to provide this service or good if he did not have drivers to deliver the service or good.*

B. Whether or not the work is part of the regular business of the principal. *In this case, transportation is the Defendant's business.*

C. Whether the principal or the worker supplies the instrumentalities, tools and the place for the person doing the work. The driver has no means or the ability on his own to purchase a vehicle without the assistance of the Defendant. *In this case, the Defendant provides all the necessary supplies, equipment and tools to perform the work that is required to operate a transportation business and then charges the Plaintiff.*

D. The alleged employee's investment in the equipment or materials required by his or her task. *In this case, the employee signs a lease to operate a truck. He had no upfront financial investment other than signing a lease.*

E. Whether the service requires special training and skills. *No skills required other then the ability to drive.* The kind of occupation, with reference to whether the work is usually done under the direction of the principal or by a specialist without supervision. *In this case, the nature of Plaintiff's work made detailed control not necessary.*

F. The alleged employee's opportunity for profit or loss depending on his managerial skill. *In this case, there is no opportunity to alter the costs to Defendants clients.*

Defendant has direct interaction with the customers and sets the contracts with its clients. Plaintiff could have never insured the vehicle so as to work for other clients as the vehicle and registration did not list him.

G. The length of time for which the services are to be performed. *In this case the work was ongoing; the Driver takes ongoing assignments from the Defendant.*

H. The degree of permanence of the working relationship. *In this case, the Plaintiff was employed only be the Defendant for almost a year and a half.*

I. The method of payment, whether by time or by the job. *Plaintiff was paid by the job.*

J. The extent of control which by the agreement, is exercised over the details of the work. *The Defendant exercises the agreements with its clients. The driver adheres to the agreements made by the Defendant and its client.*

K. Whether or not the parties believe they are creating an employer-employee relationship. *The testimony and evidence presented established that the parties entered a written agreement that provided plaintiff would be an independent contractor.*

In *Borello*, employment is defined broadly and there is a "general presumption that any person "in service to another" is a covered "employee." In this case, the Defendant has not met the burden of proof to establish that Plaintiff was an independent contractor.

Defendant cites the contract as evidence of an independent contractor agreement. However, such a written agreement is only one factor among many to be considered. The fact that a person who provides services is paid as an independent contractor, that is, without payroll deductions and with income reported by an IRS form 1099 rather than a W-2, is of no significance whatsoever in determining employment status. The employer cannot change the status from that of an employee to one of an independent contractor by illegally requiring the employee to assume a burden that the law imposes directly on the employer, that being, withholding payroll taxes and reporting such

withholdings to the taxing authorities. Here, the existence of an independent contractor agreement and the employer's payroll practices do not establish the independent contractor relationship because of the substantial evidence supporting an employee relationship when the other factors are considered.

Based on the testimony and documentation submitted by the parties, the evidence supports that few of the factors in this case were indicative of the Plaintiff being an independent contractor, however, the overriding factor in determining whether the Plaintiff was an employee rather than an independent contractor relied on the factor that the Plaintiff who performed the work was not engaged in an occupation or business distinct from that of the Defendant. Rather, his work was the basis for the Defendant's business. The Defendant obtains the clients who are in need of transportation services and provides the workers who conduct the service on behalf of the Defendant. Although there may be an absence of control over some details of the work, an employee-employer relationship will be found if the Defendant retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, and the nature of the work makes detailed control unnecessary. *Yellow Cab Cooperative v. Workers Compensation Appeals Board (1991) 226 Cal.App.3d 1288.* In this case, the Plaintiff's job duties as a truck driver were integral to the Defendant's business and like in *Yellow Cab*, the Defendant exerted control all control required.

California Labor Code § 450 (a) provides: "No employer, or agent or officer thereof, or other person, may compel or coerce any employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of anything of value. Labor Code Section 2802 provides, "(a) An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

Employers may not lawfully avoid the legal obligations by labeling their workers as independent contractors while treating them as employees, as Defendant did. Defendant provides transportation services using a workforce of drivers whom they call "independent contractor/operators." Defendants utilize this "independent contractor" label to unlawfully reap financial rewards for themselves at the expense of their workforce and to secure an unfair competitive advantage over their competitors by lowering their labor costs and shifting the risks and operating expenses while retaining the right to control their workforce that an employer exercises over employees. Plaintiff was the Defendant's employee and is entitled to protections under California law. However, Plaintiff offered no evidence of the amended amounts he seeks. *The Plaintiff is entitled to the reimbursement of his wages in the amount of $54,940.00.*

California Labor Code § 98.1.(c) states: "All awards granted pursuant to a hearing under this chapter shall accrue interest on all due and unpaid wages at the adjusted annual rate established pursuant to Section 19269 of the Revenue and Taxation Code..." Interest is due from September 17, 2011, for the non-payment of wages in the amount of $7,977.60.

California Labor Code § 202 of the California Labor Code establishes that "if an employee, not having a written contract for a definite period, quits his employment, his wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours prior notice of the intention to quit, in which case the employee is entitled to the wages at the time of quitting." Plaintiff resigned on September 14, 2011, so wages were due on September 17, 2011.

California Labor Code § 203 establishes that "if an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until

an action therefor is commenced; but the wages shall not continue for more than 30 days."

Provisions of the Labor Code relating to the payment of wages express a long-held, strong public policy for the timely and prompt payment to workers. The purpose of Section 203 is to compel the prompt payment of earned wages. Pressler v. Donald L. Bren Cal (1982) 32 Cal.3d831,837,(1940) 37 Cal.App.2D269 made it clear that the term "willful" does not require evil intent on the part of the employer, but merely that the employer intentionally did not pay for whatever reason when the pay was due.

Court refers to Labor Code Section 203 in the decision of Hale v. Morgan (1978) 22 Cal.3d 388, 149 Cal.Rptr.375 that ignorance is no defense and willful requirement means illegal act or omission and intentional without regard to motive.

Defendant has willfully failed to pay Plaintiff the balance of his earned wages in accordance with California Labor § 201. Therefore, pursuant to California Labor Code § 203 penalties are awarded Plaintiff for maximum of thirty (30) days at $300.00 per day or $9,000.00. The daily rate is calculated based on Plaintiff's average daily earnings.

CONCLUSION

For all of the reasons set forth above, IT IS HEREBY ORDERED that the Defendant pay to the Plaintiff:

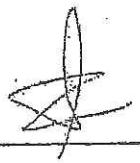
1. Plaintiff is awarded wages in the gross amount of $54,940.00, and

2. Plaintiff is awarded interest pursuant to California Labor Code § 98.1 in the amount of $7,977.60, and

3. Plaintiff is awarded Penalties pursuant to California Labor Code § 203 in the amount of $9,000.00, and

Total amount of award due to Plaintiff is $71,917.60.

Date: February 28, 2013

By: 

ALONSO SILVA

HEARING OFFICER

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL
(C.C.P. 1013A) OR CERTIFIED MAIL

I, Soledad Cazares, do hereby certify that I am a resident of or employed in the County of Los Angeles, over 18 years of age, not a party to the within action, and that I am employed at and my business address is:

LABOR COMMISSIONER, STATE OF CALIFORNIA
300 Oceangate, Suite 302
Long Beach, CA 90802
Tel: (562) 590-5048 Fax: (562) 499-6467

I am readily familiar with the business practice of my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 7, 2013 at my place of business, a copy of the following document(s):

Order, Decision or Award

was(were) placed for deposit in the United States Postal Service in a sealed envelope, by first class mail, with postage fully prepaid, addressed to:

NOTICE TO: Bingham McCutchen LLP
Att: Jessica S. Boar
355 South Grand Ave Suite 4400
Los Angeles CA90071

and that envelope was placed for collection and mailing on that date following ordinary business practices.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on: March 7, 2013 at Long Beach, California

STATE CASE NUMBER: 05-55410 LT

Soledad Cazares
Soledad Cazares

DLSE 544/DEF. ATTY. (3/06) CERTIFICATION OF MAILING L.C. 98